

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ALLEN BINSTOCK,
Regional Director of Region 8, NLRB
for and on behalf of
NATIONAL LABOR RELATIONS BOARD,

Applicant

v.

Case No. 3:17-MC-00041

MIDWEST TERMINALS OF
TOLEDO INTERNATIONAL, INC.,

Judge Jeffrey J. Helmick

Respondent

APPLICANT'S REPLY TO RESPONDENT'S OPPOSITION
TO APPLICATION FOR SUBPOENA ENFORCEMENT

1. On July 12, 2017, the National Labor Relations Board filed an Application for an order to enforce two subpoenas duces tecum and two ad testificandum. On August 17, 2017, Respondent filed an Opposition to the Application. Although Respondent's Opposition was untimely filed under Fed.R.Civ.P. 7(b) and N.D. of Ohio Civ. R. 7.1, counsel for the Applicant

requested leave to file a reply in order to clarify matters before the Court which may have been muddled by Respondent's Opposition.¹

2. The two subpoena duces tecum and two ad testificandum are related to unfair labor practice (ULP) charges filed in Cases 08-CA-152052, 08-CA-158778 and 08-CA-178669 which are pending investigation before the Region 8 Office in Cleveland. In its Opposition, Respondent incorrectly identifies the Charging Party in Case 08-CA-158778 as International Longshoreman's Association, AFL-CIO, Local 1982 (the Union). (R. Oppos. at 4, ¶ 1) (Doc. #3, PageID #596). While the Union did file the other two ULP charges, the charge in Case 08-CA-158778 was actually filed by Raymond Sims, an Individual.

3. The instant matter before the Court is not the first attempt made by the Applicant to have Respondent cooperate with the investigation into its 2015 and 2016 hiring practices, and to comply with subpoenas issued by the Region. With the Court's assistance in now closed Cases Nos. 3:15-MC-71, 3:16-MC-08 and 3:16-MC-09, Respondent provided some, but not all, of the documents previously requested in prior subpoenas. Respondent also refused to provide certain testimony because the Region had not issued a subpoena ad testificandum to its Human Resource Director Christopher Blakely.

4. In its Opposition, Respondent repeatedly asserts that the Board's investigative subpoenas are being issued only to harass Respondent and to engage in a fishing expedition. In Respondent's words, the continuation of the investigation is just evidence of further harassment in a "seemingly unending (25 months and counting) fishing expedition." (R. Oppos. at 9, ¶ 1) (Doc. #3, PageID #601). Counsel for the Applicant wishes to make clear that the investigation of these pending charges has been protracted by Respondent's own conduct which includes, *inter alia*, its

¹ While the heading of Respondent's response reads that it is filing an "Opposition to Application for Order Enforcing Subpoena Duces Tecum," the body of the document indicates that it is objecting to the enforcement of all four subpoenas.

delay in providing documents and witnesses; its continued refusal to provide certain documents relevant to the investigation; its refusal to return a signed affidavit taken by a Board Agent on July 18, 2016, from its Director of Operations Terry Leach; and its refusal to allow HR Manager Christopher Blakely to testify concerning relevant matters.²

Documents to Be Produced

5. In essence, Respondent asserts throughout its Opposition that the documents requested by the Region in its two subpoena duces tecum, Nos. B-1-U14BWX and B-1-UN5OGN, are either not relevant to the investigation or have already been produced. Contrary to Respondent's relevancy claim, the Board has already considered Respondent's same baseless assertions and found the information sought in both subpoenas duces tecum, and in both ad testificandum, to be "relevant to the matters under investigation." (App. Exhs. I and P) (Docs. #1(10) and #1(17)). Regarding its production claim, the Region has been very clear that Respondent need not provide any document that it has previously provided.

6. Specifically with respect to Subpoena Duces Tecum No. B-1-U14BWX which issued in Cases 08-CA-152052 and 08-CA-158778, the Region is requesting that Respondent be compelled to produce Items 4 and 5 which concern employment applications and other initial hiring documents:

4. Employment applications and employment documents pertaining to the hiring procedure, including any pre-hire procedures and/or training for any Casual List/New Hire employees listed on any version of the 2015 Order

² Respondent's obfuscation in the investigation is illustrated repeatedly in its Opposition. For example, Respondent writes that a "practical, working definition of an 'employee' is an individual who has been hired and worked. Based on that definition, Midwest is unaware of any casual "employee" ever denied work or access to the facility when work is available and the employee is qualified to perform the available work." (R. Oppos. at 2, ¶ 2) (Doc. #3, PageID #594). Respondent makes such a statement knowing full well that applicants who present themselves for hire are considered employees within the meaning of Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(2). *Wilmar Electric Service, Inc.*, 303 NLRB 245 (1991) ("It is a well-established principle of Board law that the Sec. 2(3) definition of employee includes applicants for employment."), *enfd.* 968 F.2d 1327 (D.C. Cir. 1992).

of Call list, including but not limited to Chad D. Moody, Derek J. Pollock, James W. Holzemer, Clifford C. Brown, Raymond J. Kreais, Joseph A. Duslak, William C. Garner, Laures J. Washington, Chad C. Klueter, and Ian M. Bell.

5. Employment applications and employment documents pertaining to the hiring procedure including any pre-hire procedures and/or training for any Casual List/New hire employees listed on any version of the 2013 Order of Call list, including but not limited to Colen Williams and Franklin L. Hayes.

(App. Exh. D) (Doc. #1(5)).

7. In the Board's April 12, 2017, Order denying Respondent's petition to revoke in NLRB Cases 08-CA-152052 and 08-CA-158778, the Board noted that it had "evaluated the subpoena duces tecum in light of the Region's assertion that it seeks only the evidence identified in pars. 4 and 5 of the subpoena." (App. Exh. I, n.1) (Doc. #1(10)). Thus, Respondent is well aware that only documents pertaining to Items 4 and 5 in Subpoena Duces Tecum No. B-1-U14BWX need be produced.

8. Concerning the second subpoena duces tecum, No. B-1-UN5OGN, that issued in Case 08-CA-178669, the Region requested the following items:

1. All security guard and/or security gate records for the time period of January 1, 2015 through June 18, 2016.
2. Shape-up meeting sign in sheets for the time period of January 1, 2015 through June 18, 2016.
3. Charged hour lists and payroll records for the time period of January 1, 2015 to June 24, 2016, for ILA Local 1982 members, Teamsters Local 20 members, and non-union employees of Midwest Terminals.
4. Employment applications and employment documents pertaining to the hiring procedure, including any pre-hire procedures and/or training for any Casual List/New Hire employees listed on any version of the 2015 Order of Call list, including but not limited to Chad D. Moody, Derek J. Pollock, James W. Holzemer, Clifford C. Brown, Raymond J. Kreais, Joseph A.

Duslak, William C. Garner, Laures J. Washington, Chad C. Klueter, and Ian M. Bell.

5. Employment applications and employment documents pertaining to the hiring procedure including any pre-hire procedures and/or training for any Casual List/New hire employees listed on any version of the 2013 Order of Call list, including but not limited to Colen Williams and Franklin L. Hayes.

(App. Exh. K) (Doc. #1(12)).

9. Because Items 2 and 3 seek the same documents as requested in the Region's earlier subpoena duces tecum as described above in Reply Paragraphs 6 and 7, the Applicant has made it abundantly clear that Respondent need not provide the same information twice. The Board recognized the similarity between the two subpoenas in its April 25, 2017 Order denying Respondent's petition to revoke the subpoenas in Case 08-CA-178669. The Board wrote "[i]f the Employer complies with its obligation to produce information required by the April 12 Order, it does not need to reproduce the information sought in par. 2 and 3 of subpoena B-1-UN5OGN." (App. Exh. P, n.1) (Doc. #1(17)).

10. Regarding remaining Items 1, 4 and 5 in Subpoena Duces Tecum No. B-1-UN5OGN, Applicant notes that the Region narrowly tailored its request to obtain documents which had not been previously produced. In its April 25 Order, the Board acknowledged Respondent's assertion that it had already provided some of these documents by instructing Respondent to do the following:

To the extent that the Employer [Respondent] has provided some of the requested material, it is not required to produce that information again, provided that the Employer accurately describes which documents under subpoena it has already provided, states whether those previously-supplied documents constitute all of the requested documents, and provides all of the information that was subpoenaed.

(App. Exh. P, n.1) (Doc. #1(17)). Consequently, Respondent should be ordered to produce all documents relating to Items 1, 4 and 5; or create a log describing all documents that it claims have already been produced.

The Testimony of HR Manager Blakely

11. The Region issued the two investigative subpoenas ad testificandum at question in the instant case, Nos. A-1-U13XSB and A-1-UN5U35, to HR Manager Christopher Blakely because Respondent refused to permit Blakely to give deposition-type sworn testimony under oath on October 12, 2016, regarding the substance of the unfair labor practice allegations. (App. Exhs. E and L) (Docs. #1(6) and #1(13)). Respondent argued that the Region was precluded from questioning Blakely because a subpoena ad testificandum had not issued along with the three earlier-issued investigative subpoenas duces tecum, Nos. B-1-OVH01X, B-1-NNRRDX, B-1-O179FN, that had been directed to Blakely in 2015. By issuing the two ad testificandum subpoenas for testimony concerning the pending ULP allegations, which incorporate by reference the three 2015 subpoena duces tecum, the procedural impediment previously raised by Respondent has now been eliminated.

12. In its Opposition, Respondent further claims that Blakely “cannot be compelled to provide testimony related to the documents produced in response to Subpoena Duces Tecum B-1-0179FN” because this subpoena had been issued pursuant to Case 08-CA-155327. (R. Oppos. at 15, ¶ 1) (Doc. #3, PageID #607). Respondent contends that because the allegation raised in Case 08-CA-155327, which dealt with the transfer/diversion of bargaining unit work to another of location, is different from the allegations raised in the three current charges, which deal with Respondent’s 2015 and 2016 hiring practices, Blakely should not be compelled to testify about the documents. However, Respondent’s logic is faulty. While the allegation in now closed Case 08-CA-155327 may

be different, many of the documents that were provided are also responsive to Respondent's hiring practices which include security guard and gate records, attendance sheets for pre-hire "shape-up" meetings, payroll records and charged hour sheets. Consequently, Respondent's argument is without merit.

13. Finally, Respondent has failed to articulate any cogent reason why Blakely should not be produced to provide testimony pursuant to the subpoenas. As mentioned above, the Board rejected Respondent's petition to revoke the two ad testificandum in its April 12 and 25 Orders. The Board found that all four subpoenas sought "information relevant to the matters under investigation and describe[d] with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations." (App. Exhs. I and P) (Docs. #1(10) and #1(17)). Accordingly, HR Manager Blakely should be compelled to give testimony before a Board Agent concerning the matters encompassed within the two subpoenas ad testificandum.

Conclusion

14. In its Opposition, Respondent repeatedly asserts that the subpoenas are unreasonable, oppressive and unduly burdensome. But Respondent has no credible basis for making these assertions. Respondent relies on, in part, its meritless claim that it will be required to produce duplicative documents. Respondent also erroneously asserts that the documents and testimony regarding Respondent's hiring practices is not necessary because a prior administrative law judge's decision has sufficiently disposed of the issues raised in the instant investigations.³ (R. Oppos. at 14, ¶ 1) ((Doc. #3, PageID #606).

³ Respondent refers to ALJ Mark Carissimi's decision in which Respondent was found to have committed earlier unfair labor practices, including making threats and discriminatorily refusing to assign work, both before and after the expiration of its local collective bargaining agreement with the Union in December 2010. *Midwest Terminals of Toledo International*, 362 NLRB No. 57 (2015). In its Opposition, Respondent repetitively misrepresents the ALJ's

15. Contrary to Respondent's baseless claims, the documents and testimony sought by the Region are particularly identified in all four subpoenas for which the Applicant seeks enforcement. The subpoenas seek documents over a limited period of time for a relatively small workforce.⁴ The documents and testimony fully relate to the unfair labor practices under investigation which allege discrimination and/or bad faith bargaining relating to Respondent's 2015 and 2016 hiring practices.

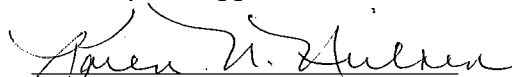
16. As Respondent's contumacy has frustrated and delayed the Board's ability to exercise its statutory function under the National Labor Relations Act, the Applicant respectfully requests that its Application for Order Enforcing Subpoenas Duces Tecum and Ad Testificandum be granted.

Respectfully submitted,

National Labor Relations Board

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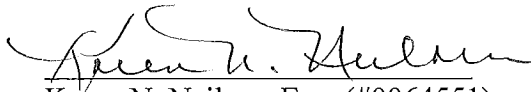
decision as being dispositive of the issues in the instant case merely because the "Order of Call" procedures were described. *Id.*, slip op. at 7-8. Contrary to Respondent's assertions, the ALJ made no such specific findings. Rather in dismissing one of the Section 8(a)(5) allegations, the ALJ noted that Respondent had given notice and an opportunity to bargain to the Union. *Id.*, slip op. at 11. Citing *Long Mile Rubber Co.*, 245 NLRB 1337 (1979), the ALJ wrote that "[t]he Board has held that the manner in which employees are dispatched for work is a mandatory subject of bargaining." *Id.*

⁴ According to its Opposition, Respondent employs approximately 7 skilled employees, and 20 to 25 regular employees. (R. Oppos. at 14, ¶ 1) (Doc. #3, PageID #606).

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2017, I filed electronically, via the CM/ECF System, the foregoing Applicant's Reply to Respondent's Opposition to Application for Subpoena Enforcement with the Clerk of Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt including the following counsel:

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